78-268

Supreme Court, U. S.
FILED
AUG 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

LUKE GILLESPIE,

Petitioner,

—against—

GLORIA SCHWARTZ, WILLIAM SCHWARTZ, and BOSTON HOSPITAL FOR WOMEN,

Respondents.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO. and the Estate of KENNETH EDWARD BENTLEY,

Petitioners,

—against—

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Luke Gillespie, Superior Motor Express, Earnhardt Lumber Co. and the Estate of Kenneth Edward Bentley, respectfully pray that a Writ of Certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on June 12, 1978.

Opinion Below

The opinion of the Court of Appeals, *sub nom. O'Connor* v. *Lee-Hy Paving Co., inter alia,* not yet reported, appears in the Appendix hereto. The judgment and order of the United States Court of Appeals, Second Circuit, dated June 12, 1978, is found in the Appendix. The endorsement order of District Judge Morris E. Lasker in the action entitled *Schwartz* v. *Boston Hospital for Women, et al.,* in the United States District Court, Southern District of New York, not reported, appears in the Appendix hereto.

The memorandum and order of District Judge Eugene H. Nickerson in the action entitled *Kotsonis* v. *Superior Motor Express, et al.* in the United States District Court, Eastern District of New York, not reported, appears in the Appendix hereto.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was entered on June 12, 1978. No petition was filed to said Court by petitioners herein for rehearing *en banc.* This petition for a Writ of Certiorari is being filed within 90 days from the entry of the order of the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1251(1).

Questions Presented

1. Has the decision of this Court in *Schaffer* v. *Heitner,* 433 U.S. 186, and the rule enunciated in *International Shoe Co.* v. *Washington,* 326 U.S. 310, rendered unconstitutional *quasi-in-rem* jurisdiction, obtained by attachments of public liability insurance policies of non-resident defendants pursuant to the authority of *Seider* v. *Roth,* 17 N.Y. 2d 111?

2. Is the mere presence of a non-resident's public liability insurance carrier in the forum state sufficient to satisfy the contact requirements, enunciated in *Schaffer* v. *Heitner,* 433 U.S. 186, for jurisdiction over an insured who has no contact with the forum state?

3. Is it constitutionally proper under the guidelines, set forth by this Court, for a non-resident defendant to be subjected to the jurisdiction of a Court where the sole method of obtaining jurisdiction over him by a resident plaintiff of the forum state is predicated solely upon the attachment of a policy of public liability insurance, issued by a company which resides in the forum state, and where the only means of the resident plaintiff subjecting the non-resident insured defendant to jurisdiction in the forum state is the attachment of the policy?

4. Is it proper for a Court to *create* a "direct" action against a public liability insurance carrier, which procedure in and of itself is prohibited by the statutes of the forum state, to justify subjecting a non-resident defendant, the insured, to jurisdiction in the forum state and to thereby deprive the insured, the defendant, of substantial rights he has in the subject matter of the action?

Statutory Provisions Involved

Federal Rules of Civil Procedure:

Rule 64:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in

the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Rule 4(e):

"*Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state,

service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

New York Civil Practice Law and Rules (McKinney's Consolidated Laws of New York Annotated):

Section 6223:

"Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court shall give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action."

Section 5201:

"(a) *Debt against which a money judgment may be enforced.* A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

"(b) *Property against which a money judgment may be enforced.* A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future

right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

"(c) *Proper garnishee for particular property or debt.*

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that in the case of a security which is transferable in the manner set forth in section 8-320 of the uniform commercial code, the firm or corporation which carries on its books an account in the name of the judgment debtor in which is reflected such security, shall be the garnishee; provided, however, that if such security has been pledged, the pledgee shall be the garnishee."

Insurance Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated):

Section 167(1)(b):

"A provision that in case judgment against the insured or his personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract, shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract."

Statement of the Cases

This joint petition is brought by petitioners, who were defendants in two separate actions, instituted by the respondents, the respective plaintiffs therein, in the United States District Court, Southern District of New York and the United States District Court, Eastern District of New York, respectively, pursuant to 28 U.S.C. Section 1332. A single petition is herewith filed pursuant to Rule 23(5) of the Rules of this Court on the grounds that the cases in-

volve identical questions of law, and the order of the United States Court of Appeals for the Second Circuit, dated and entered June 12, 1978, determined the issues in each case.

With respect to the petitioner, Luke Gillespie, the action was commenced in the United States District Court, Southern District of New York, by respondents, Gloria Schwartz and William Schwartz (hereinafter referred to as "Schwartz"), based upon a claim for personal injuries and loss of services arising out of alleged acts of medical malpractice which are said to have taken place at the Boston Hospital for Women, Boston, Massachusetts, during and prior to November 1966. It is alleged that petitioner, Luke Gillespie (hereinafter referred to as "Gillespie"), treated respondent Gloria Schwartz during her confinement for the birth of her child at the aforesaid Boston Hospital for Women during the aforesaid period.

At the time of the commencement of the action in the District Court, respondents, "Schwartz", were residents of the State of New York and the action was brought in said Court based solely upon the diversity of citizenship of the parties. *It is uncontroverted that, prior to and subsequent to the commencement of the aforesaid action, petitioner "Gillespie" was a resident of the State of Massachusetts and had no contacts of any kind with the State of New York.*

Prior to the service of process upon petitioner, "Gillespie," respondents, "Schwartz," sought and obtained an order of attachment which provided for the attachment of a policy of public liability insurance, issued to petitioner, Gillespie, by the Lumbermens Mutual Casualty Company, for the purpose of obtaining quasi-in-rem jurisdiction over the petitioner, Gillespie. Said order of attachment was granted on April 7, 1971. The attachment of the aforesaid

policy of public liability insurance was based upon the decision of the New York Court of Appeals in *Seider* v. *Roth*, 17 N.Y. 2d 111.

Subsequent to the decision by this Court in *Schaffer* v. *Heitner*, 433 U.S. 186, petitioner, Gillespie, sought an order, pursuant to Rule 64 FRCP and Section 6223 NYCPLR, vacating and setting aside the order of attachment on the ground that said order of attachment violated the due process clause of the United States Constitution and for other related relief. Said application was denied by Judge Morris E. Lasker in an endorsement order dated October 21, 1977, found in the Appendix.

With respect to the petitioners, Superior Motor Express, Earnhardt Lumber Co. and the Estate of Kenneth E. Bentley, an action was commenced by respondent, Fontini Kotsonis (hereinafter referred to as "Kotsonis"), in the United States District Court, Eastern District of New York, against the aforesaid petitioners (hereinafter referred to as "Superior"), based upon a claim of conscious pain and suffering and wrongful death of the decedent, Padias Kotsonis, as a result of a motor vehicle accident which occurred in the State of Maryland on February 24, 1976, based solely upon the ground of diversity of citizenship. Prior to the service of process upon "Superior", respondent, Kotsonis, obtained a supplemental order of attachment which provided for the attachment of a policy of motor vehicle public liability insurance, issued by the Kemper Insurance Companies to petitioner, Superior, for the purpose of obtaining quasi-in-rem jurisdiction over petitioners, Superior. It is to be noted that at the commencement of the action and prior thereto, petitioner "Superior" were citizens and residents of the State of North Carolina and had no contacts of any kind with the State of New York. Said supplemental order of attach-

ment was granted on September 16, 1977. As in the action involving petitioner, Gillespie, the order of attachment was based upon the decision of the New York State Court of Appeals in *Seider* v. *Roth, supra.* Again, as in the action involving petitioner Gillespie, petitioners, Superior, based upon the decision of this Court in *Schaffer* v. *Heitner, supra,* sought an order vacating and setting aside the supplemental order of attachment on the ground that said order of attachment violated the due process clause of the United States Constitution and for other related relief. Said application was heard by Judge Eugene H. Nickerson who denied the application in a memorandum and order dated December 6, 1977, which is found in the Appendix.

In each of the foregoing matters the District Court certified that the issues involved controlling questions of law as to which there were substantial grounds for differences of opinion (28 U.S.C. Section 1292(b)). Petitions for leave to appeal to the Court of Appeals, Second Circuit, were filed on behalf of each of the petitioners herein and said petitions were granted by said Court. In so doing, the United States Court of Appeals, Second Circuit, *sua sponte* joined said appeals with similar applications in two other non-related matters and heard these appeals jointly.

In its opinion and order dated June 12, 1978, sub nom. *O'Connor* v. *Lee-Hy Paving Corp.,* the United States Court of Appeals, Second Circuit, affirmed the orders of the District Courts in each of the matters under review. In so doing the United States Court of Appeals, Second Circuit, held in essence that the attachment procedure, first enunciated in the State of New York in *Seider* v. *Roth, supra,* wherein jurisdiction over the non-resident insureds was obtained in the District Courts by virtue of an attachment of policy of public liability insurance, did not offend the rule of "fair play and substantial justice," applied by

this Court in *Schaffer* v. *Heitner, supra* to in rem attachment actions.

The reasoning of the United States Court of Appeals, Second Circuit, was based largely upon its prior decision in *Minichiello* v. *Rosenberg,* 410 F. 2d 106, aff'd in rehearing en banc 410 F. 2d 117, cert. den. 396 U.S. 844 and the decision by Judge Dooling in *O'Connor* v. *Lee-Hy Paving Corp.,* 437 F. Supp. 994. The Court of Appeals also determined that, notwithstanding any other "contacts" between the non-resident defendant and the forum state, the fortuitous circumstances that the insurer of such defendant had an office in the forum state wherein it transacted its business was sufficient contact and circumstance to satisfy the rule enunciated in *International Shoe Co.* v. *Washington, supra,* as applied by this Court in *Schaffer* v. *Heitner, supra.* The United States Court of Appeals further determined that the commencement of the action by the attachment of the liability insurance policy was "in fact" a direct action against the insurer, with the insured as only a nominal defendant.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals conflicts with the controlling decision of this Court.

Where, as in the instant petition, the order, sought to be reviewed, conflicts with a controlling decision of this Court, a petition for a Writ of Certiorari has been granted. (Cf. *Schlude* v. *Commissioner,* 372 U.S. 128; *Wilkinson* v. *U.S.,* 365 U.S. 399; *Braen* v. *Pfeifer Transportation,* 361 U.S. 129).

The underlying basis for each of the applications by petitioners herein for a vacatur of the orders of attachment is the decision of this Court in *Schaffer* v. *Heitner, supra,* which in essence overruled the decision by this Court in *Harris* v. *Balk,* 198 U.S. 215 insofar as such decision would apply to attachments creating quasi-in-rem jurisdiction. The decision in *Schaffer* v. *Heitner, supra* ended the dichotomy of conditions precedent for obtaining in personam jurisdiction and in rem jurisdiction and substituted the singular test of "fair play and substantial justice" enunciated in *International Shoe Co.* v. *Washington,* 326 U.S. 310.

The majority opinion of this Court in *Schaffer* v. *Heitner,* written by Mr. Justice Marshall, which contained an exhaustive review of the principles and judicial sources which preceded this landmark decision, can be summed up in the following portion thereof:

> "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally *unfair to the defendant.* (Emphasis supplied)."

In footnote 39 of Mr. Justice Marshall's opinion it was noted that:

> "It would not be fruitful for us to reexamine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. *To the extent that prior decisions are inconsistent with this standard, they are overruled.* (Emphasis supplied)."

The attachment procedure, adopted by respondents in these actions, had its genesis in two decisions by the New York State Court of Appeals: *Seider* v. *Roth, supra* and *Simpson* v. *Loehmann,* 21 N.Y. 2d 305, motion for rehearing denied 21 N.Y. 2d 990. These decisions provide for a resident plaintiff attaching a policy of public liability insurance, issued by a liability insurance carrier doing business in the State of New York to a non-resident insured defendant, for the purposes of establishing jurisdiction over such defendant in an action arising out of a claim of injury and damages occurring outside of the territorial limits of the State of New York. In so doing the jurisdiction of the Court is based upon quasi-in-rem jurisdiction over such non-resident defendant without subjecting him to the personal jurisdiction of the Court. This procedure has been followed in both the New York State Courts and the United States District Courts in the various Districts of New York (Cf. *Minichiello* v. *Rosenberg,* 410 F. 2d 106, rehearing en banc 410 F. 2d 117, cert. den. 396 U.S. 844; *Donawitz* v. *Danek,* 42 N.Y. 2d 138; *Neuman* v. *Dunham,* 39 N.Y. 2d 999).

Since the development of this procedure by the New York State Court of Appeals in *Seider* v. *Roth, supra,* the procedure has been subject to attack both in the Courts and by commentators on the law.

In the Federal jurisdiction, the United States Court of Appeals, Second Circuit, in *Minichiello* v. *Rosenberg, supra,* was the first Appellate Court to be faced with the question of the application of the due process clause of the United States Constitution to such quasi-in-rem jurisdiction. In the majority opinion of that Court, after rehearing en banc, Circuit Court Judge Friendly commented (410 F. 2d 117):

"Appellants complain we did not adequately focus on the burden to a non-resident of having to defend a personal injury action in another state, conceivably far from his domicile and the place of accident, simply because his liability insurer has chosen to do business there. We find this argument unpersuasive *so long as Harris* v. *Balk*, 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905), *stands*." (Italics supplied.)

Judge Matthew Jasen in his concurring opinion in *Donawitz* v. *Danek, supra,* decided June 14, 1977, which by dictum, reaffirmed said Court's continuation of the viability of these attachments, based solely upon the principle of *stare decisis,* observed that such attachments were bottomed upon the decision of this Court in *Harris* v. *Balk, supra.* Judge Jasen then opined that:

"Until such time as the Supreme Court chooses to overrule (Harris v. Balk) and that time may not be far off, State Courts are bound by it."

It is manifestly clear that the intent of this Court, in vitiating the dichotomy between the principles of *Harris* v. *Balk, supra* and *International Shoe Co.* v. *Washington, supra,* was to create in the field of jurisdiction by attachment the requirement, certainly at least by inference with respect to attachments of public liability insurance policies, that the proposed defendant must have some other contacts with the forum state in addition to the fortuitous circumstance of the presence of his public liability insurance carrier in said state. This is clear from the decision of this Court in *Rush* v. *Savchuk,* —— U.S. ——, 97 S. Ct. 2964.

In *Rush* v. *Savchuk, supra,* this Court was requested to grant a petition for Writ of Certiorari for review of a judgment of the Supreme Court of the State of Minnesota

(*Savchuk* v. *Rush,* 245 N.W. 2d 624). In response to that petition this Court vacated the aforesaid judgment and remanded the matter to the state court

"*for further consideration in light of Schaffer* v. *Heitner* (citation omitted)."

A review of *Savchuk* v. *Rush, supra,* reveals that the Supreme Court of Minnesota had affirmed the granting of an order of attachment of a policy of public liability insurance issued to the non-resident defendant-petitioner for the purpose of establishing quasi-in-rem jurisdiction. Certainly, this Court desired the state court to which it remanded the case to appraise the "contacts" the *defendant* had with the forum state.

The decision of the United States Court of Appeals, Second Circuit, under review reveals that the Court below failed to apply the principles enunciated in this Court's decision in *Schaffer* v. *Heitner, supra* and *International Shoe Co.* v. *Washington, supra,* and its own decision in *Minichiello* v. *Rosenberg, supra.* In so doing the United States Court of Appeals ignored the salient fact that the petitioners herein had no contacts with the forum state other than the presence of their insurance carrier within the State of New York.

It would appear that in arriving at its conclusions that the attachment procedure comports favorably with the due process clause of the United States Constitution, the Court below chose by way of convoluted reasoning to transform such an action into a judicially created "direct action" against the insurer and reasoned further that the non-resident defendant insured was merely a nominal defendant with no rights other than to be subjected to the requirements of his insurer to participate as a "witness" in the proceedings. This Court's attention is respectfully

directed to the provisions of the Insurance Law of the State of New York Section 167(1)(b) which provides for the sole and only basis upon which a "direct action" can be maintained against the public liability insurance carrier. No other action is permissible under the laws of the State of New York and the New York State Constitution (Article VI). (*Thrasher* v. *U.S. Liability Insurance Co.*, 19 N.Y. 2d 159).

Judge Scilleppi in his opinion in *Thrasher* v. *U.S. Liability Insurance Co., supra,* in commenting upon the foregoing principles stated, in part, as follows:

> "The Supreme Court is a court of general jurisdiction, and it is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed. (N.Y. Const., art. VI). A direct action suit against an insurer provided for by Section 167 (sub. 1, par. (b)) of the Insurance Law is a cause of action which was unknown to the common law. (Royal Ind. Co. v. Travelers Ins. Co., 244 App. Div. 582, 280 N.Y.S. 485, aff'd. 270 N.Y. 574, 1 N.E. 2d 337)."

The United States Court of Appeals, Second Circuit, further cast aside the clear intention of this Court's decision in *Schaffer* v. *Heitner* to determine the propriety of the Court's jurisdiction in light of fairness *to the defendant* by finding that:

> "Here the sufficient basis (for jurisdiction) is furnished by the insurer's maintaining an office and regularly transacting business in New York—not to speak of the convenience to the plaintiff in having a trial where witnesses on damage will be more readily available and the fact that in the large proportion of these actions that are settled the insurer usually has no particular interest in requiring the action to be brought

> at the site of the accident or the residence of the insured."

As part of the convoluted reasoning of the Court below, in justifying the propriety of the attachment proceedings, the Court in effect determined without comment that the *res* attached i.e., the policy of public liability insurance, is in fact an attachable asset of the insured non-resident defendant sufficient to satisfy the attachment statute (Section 5201, subdiv. (b) NYCPLR). It is submitted that there is in fact no attachable "debt" with respect to the public liability policy since it is at best an inchoate contractual obligation, personal in nature, between the insured and the insurer (*Simpson* v. *Loehmann*, 21 N.Y. 2d 314). Judge Jasen in *Donawitz* v. *Danek, supra,* held that the policy of public liability insurance so attached "has no real economic significance. * * * It is unassignable and execution upon it would be most impracticable." All of the foregoing leads to the unavoidable conclusion, as found by Judge Breitel in his concurring opinion in *Simpson* v. *Loehmann, supra,* that the propriety of the attachment procedure herein under review is based upon circular or "bootstrap" reasoning.

It is interesting to note that the United States Court of Appeals, in its footnote 4 of its decision in the case *sub judice,* appears to be unsettled in its conclusions and leaves open a further review of the merits of the attachment procedure evolved from *Seider* v. *Roth supra* by the New York Court of Appeals "in light of the general illumination afforded by *Schaffer* or otherwise, * * *" to determine whether the continued existence of such procedure "is undesirable as a matter of New York law." It is submitted that the Court of Appeals begs the very question placed before it by the petitioners herein and hopes for further resolution of the issues by the New York

State's highest court. It is fundamental that in an action involving diversity of citizenship the Federal Courts are bound to apply the laws and decisional rules of both the forum state and the Federal jurisdictions where applicable (Cf. *Podolsky* v. *Devinney*, 281 F.Supp. 488, and the cases cited therein). However, in the absence of a determination by the Court of ultimate appellate jurisdiction of the state the Federal Court must determine for itself the manner in which such ultimate appellate court would determine the issue before it. (*Trail Builders Supply Co.* v. *Reagan*, 409 F.2d 1059, supplemented 410 F.2d 763; *Imperial Enterprises, Inc.* v. *Fireman's Fund Ins. Co.*, 535 F.2d 287).

It is thus submitted, that the Court of Appeals improperly concluded that the rule of "fair play and substantial justice" enunciated by this Court in *International Shoe Co.* v. *Washington* and applied in *Schaffer* v. *Heitner*, *supra*, have been met by the invocation of the District Court's jurisdiction over the non-resident petitioners herein by virtue of an attachment of said petitioner's policy of public liability insurance.

An eminent commentator, Professor Joseph M. McLaughlin, in his article in the New York Law Journal of July 14, 1978, in treating with the decision by the United States Court of Appeals for the Second Circuit in this case, indicates that holding the insured, the defendant, to be a nominal party is jurisdictional legerdemain with which reasoning he has difficulty. He indicates that it is disingenuous to assert that a direct action against the insurance company does not burden the named defendant in view of the fact that the named defendant is obligated to come to New York to participate in the litigation *even though he may never have been in this state, has no other contacts with New York and he is deprived of something*

substantial by having the trial of the action against him brought in a foreign forum. His substantial rights with respect to the impleader of other defendants may be prejudiced. He sums up the untenability of the decision of the Court below in stating that

> "If the lesson of *Shaffer* v. *Heitner* is that there must be a contract (sic) between the defendant and New York so that the maintenance of the law suit does not offend traditional notions of fair play, I have serious doubts as to whether the insured is being treated fairly."

If there were an accident between an automobile of A and a passenger bus in which there were 50 passengers of citizenship, diverse from that of A, it is conceivable under the reasoning of the United States Court of Appeals that A could be subjected to an action in 50 states merely by the attachment of his automobile policy, issued by an insurance company which has an office in each of the 50 states. This certainly offends any ordinary notions of fair play.

II.

The decision below conflicts with prior decisions of other federal Courts of Appeal.

Where, as in the instant petition, a decision by a Court of Appeals conflicts with decisions of sister circuits, this Court may grant a petition for certiorari to resolve the apparent conflicts (*Avco Corp.* v. *Aero Lodge*, 390 U.S. 557; *Northeastern* v. *U.S.*, 387 U.S. 213). It is submitted that the order and decision herein under review is in substantial conflict with the decisions by the United States Court of Appeals, Fifth Circuit, in *Kirchman* v. *Mikula*,

443 F. 2d 816 and the United States Court of Appeals, Third Circuit, in *Robinson* v. *O. F. Shearer & Sons Inc.*, 429 F. 2d 83.

In *Kirchman* v. *Mikula, supra,* and *Robinson* v. *O. F. Shearer & Sons, Inc., supra,* each of the Federal Courts of Appeals involved, determined, based upon the principles enunciated in *Seider* v. *Roth, supra,* that the method sought to obtain jurisdiction over the non-resident defendant was improper.

The United States Court of Appeals, Second Circuit, in *Minichiello* v. *Rosenberg, supra,* as commented upon in Point I hereinabove, determined that such procedure would be proper "so long as *Harris* v. *Balk* (citations omitted) stands." It is manifestly clear that *Harris* v. *Balk, supra,* no longer applies to in rem jurisdiction by way of attachment where there are no other contacts of the defendants with the forum state. The United States Court of Appeals should have found in the case at bar that the attachment procedure, pursuant to *Seider* v. *Roth, supra,* without any other contacts of the defendant with the forum state, contravenes the due process clause of the United States Constitution.

In light of these conflicts among sister Courts of Appeal, it is urged that the issues should be resolved by this Court so that a uniform body of law may evolve protecting defendants who have no contacts at all with the forum state, other than the presence of their liability insurance carrier, in order that such defendants are afforded the protection provided in the United States Constitution.

III.

The decision below raises significant and recurring federal constitutional problems concerning jurisdiction over non-resident defendants.

In the present state of our mobile society in the United States it is manifestly clear that the citizens of the various states may for one reason or another become involved in accidents far from home giving rise to various and prolific causes of action. The result of such occurrences poses the problem of the selection and choice of the forum in which such disputes may be resolved. One need only refer to the decisions, quoted by the United States Court of Appeals in its decision (Appendix P. 10a), setting forth merely those cases which have arisen in the State of New York subsequent to the enunciation of this Court's decision in *Schaffer* v. *Heitner,* as well as the well-reasoned decision by District Judge Blumenfeld in footnote 4 of his decision in *Sykes* v. *Beal,* 392 F. Supp. 1089, to conclude that there is a continuing significant and recurring problem with respect to such litigation and the underlying fundamental issue of jurisdiction over the non-resident defendant. This, perforce, gives rise to the significant question of review of the interests of the *defendant* (the insured) which Mr. Justice Marshall, in his opinion in *Schaffer* v. *Heitner,* found to be of paramount importance.

It is respectfully submitted that the constitutional underpinnings of *Seider* v. *Roth* are mired in quicksand and the United States Court of Appeals for the Second Circuit in its effort to allow a resident plaintiff to have the benefit of his or her forum state has judicially stretched the notions of fair play to the point where the *defendant's* rights have been completely overlooked or have been tied to his

insurer who is not a party to the action and whose policy is the boot strap by which the plaintiff hales the defendant, the insured, into a foreign forum.

CONCLUSION

Fore the foregoing reasons a Writ of Certiorari should issue to review the order and opinion of the Court of Appeals, Second Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 16 1978
MICHAEL RODAK, JR., CLERK

78-268

IN THE

Supreme Court of the United States

October Term, 1978

LUKE GILLESPIE,

Petitioner,

—against—

GLORIA SCHWARTZ, WILLIAM SCHWARTZ, and BOSTON HOSPITAL FOR WOMEN,

Respondents.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO. and the Estate of KENNETH EDWARD BENTLEY,

Petitioners,

—against—

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,

Respondent.

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of June one thousand nine hundred and seventy-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. MURRAY I. GURFEIN,
HON. THOMAS J. MESKILL,
Circuit Judges.

78-7050—78-7051

MARGUERITE T. O'CONNOR, as Administratrix of the Goods, Chattels and Credits of DANIEL J. O'CONNOR, Deceased,
Plaintiff-Appellee,

v.

LEE-HY PAVING CORP. and DAVIS E. CLEM,
Defendants-Appellants.

78-7058

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,
Plaintiff-Respondent-Appellee,

v.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO., and the Estate of KENNETH EDWARD BENTLEY,
Defendants-Petitioners-Appellants.

Order and Judgment of Circuit Court of Appeals, Second Circuit dated June 12, 1978

78-7076—78-7044

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,

Plaintiffs-Appellees,

v.

BOSTON HOSPITAL FOR WOMEN, also known as Boston Lying In Hospital, and LUKE GILLISPIE,

Defendants-Appellants.

78-7047

VINCENT J. FERRUZZO,

Plaintiff-Appellee,

v.

BRIGHT TRUCKING INC., JOE E. LARSON and LANDY OF WISCONSIN, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

By /s/ MARTIN HELLER
Deputy Clerk

Opinion of U.S. Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 845, 846, 849, 851, 878, 879—September Term, 1977.

(Argued April 12, 1978 Decided June 12, 1978.)

Docket Nos. 78-7044, 78-7047, 78-7050, 78-7051, 78-7058, 78-7076

MARGUERITE T. O'CONNOR, as Administratrix of the Goods, Chattels and Credits of DANIEL J. O'CONNOR, Deceased,

Plaintiff-Appellee,

v.

LEE-HY PAVING CORP. and DAVIS E. CLEM,

Defendants-Appellants.

VINCENT J. FERRUZZO,

Plaintiff-Appellee,

v.

BRIGHT TRUCKING INC., JOE E. LARSON and LANDY OF WISCONSIN, INC.,

Defendants-Appellants.

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,

Plaintiff-Appellee,

v.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO. and the Estate of KENNETH EDWARD BENTLEY,

Defendants-Appellants.

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,

Plaintiffs-Appellees,

v.

BOSTON HOSPITAL FOR WOMEN, also known as BOSTON LYING IN HOSPITAL, and LUKE GILLESPIE,

Defendants-Appellants.

Before:

FRIENDLY, GURFEIN and MESKILL,

Circuit Judges.

Appeals pursuant to 28 U.S.C. § 1292(b), from orders of the District Courts for the Eastern and Southern Districts of New York. Dooling, Lasker, Nickerson and Sifton, *Judges,* sustaining jurisdiction in negligence actions against non-resident defendants for wrongful death or personal injury caused by an out-of-state accident to New York residents, wherein jurisdiction was obtained by the attachment of a liability policy issued to the defendants by an insurer doing business in New York, and from an order of the District Court for the Eastern District

of New York, Dooling, *Judge,* in one of these cases holding that liability was determinable by New York rather than Virginia law.

Affirmed.

WHITNEY NORTH SEYMOUR, Esq., New York, N.Y. (Roy L. Reardon, Esq., Thomas M. Bistline, Esq., and Simpson Thacher & Bartlett, Esqs., New York, N.Y., of Counsel), for *Appellants Lee-Hy Paving Corp. and Davis E. Clem.*

CYRUS M. DIAMOND, Esq., New York, N.Y. (Abraham Fuchsberg, Esq., Henry H. Foster, Jr., Esq., and Fuchsberg & Fuchsberg, Esqs., New York, N.Y., of Counsel), *for Appellee, Marguerite T. O'Connor, etc.*

LEONARD A. RUBUSTO, Esq., New York, N.Y. (John J. Langan, Esq., New York, N.Y., of Counsel), *for Appellants Bright Trucking Inc., Joe E. Larson and Landy of Wisconsin, Inc.*

MARVIN L. SCHWARTZ, Esq., New York, N.Y. (Elias, Schewel & Schwartz, Esqs., New York, N.Y., of Counsel), *for Appellee Vincent J. Ferruzzo.*

SIDNEY A. SCHWARTZ, Esq., New York, N.Y. (William Paul Last, Esq., and Alexander, Ash, Schwartz & Cohen, Esqs., of Counsel), *for Appellants Superior Motor Express, Earnhardt Lumber Co. and the Estate of of Kenneth Edward Bentley.*

J. Steven Long, Esq., Staten Island, N.Y. (James T. Murphy, Esq., and Decker & Long, Esqs., Staten Island, N.Y., of Counsel), *for Appellee Fontini Kotsonis, etc.*

Sidney A. Schwartz, Esq., New York, N.Y. (William Paul Last, Esq., and Alexander, Ash, Schwartz & Cohen, Esqs.), *for Appellant Luke Gillespie.*

Solomon M. Cheser, Esq., New York, N.Y. (Tell, Cheser, Breitbart & Lefkowitz, Esqs., New York, N.Y., of Counsel), *for Appellant Boston Hospital for Women.*

Cyrus M. Diamond, Esq., New York, N.Y. (Abraham Fuchsberg, Esq., and Fuchsberg & Fuchsberg, Esqs., New York, N.Y., of Counsel), *for Appellees Gloria Schwartz and William Schwartz.*

Friendly, *Circuit Judge:*

We have before us four interlocutory appeals, pursuant to 28 U.S.C. § 1292(b), which raise the question whether *Seider* v. *Roth*, 17 N.Y. 2d 111, 269 N.Y.S.2d 99 (1966), sanctioning a procedure for obtaining jurisdiction in a negligence action by a New York resident against a non-resident defendant for wrongful death or personal injury in an out-of-state accident through attachment of a policy of liability insurance issued by an insurer doing business in New York, the constitutionality of which was upheld by this court in *Minichiello* v. *Rosenberg*, 410 F.2d 106 (1968), *adhered to en banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844 (1969), has been undermined by *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). A fifth interlocutory appeal pursuant

to 28 U.S.C. § 1292(b) in one of these cases raises an independent question whether the district court was correct in holding that the liability of the defendant was determinable not by Virginia law, under which allegedly no liability could exist, but rather by New York law, under which it could if negligence was established. All four actions were brought by New York resident plaintiffs against non-resident defendants, and federal jurisdiction rested on 28 U.S.C. § 1332.

In each of the four cases the district courts denied motions of the defendants to vacate the attachment of their insurance policies and dismiss the actions. Since the cases are similar so far as the legal question is concerned and the courts in *Schwartz*, *Kotsonis*, and *Ferruzzo* expressly followed the lead of Judge Dooling's opinion in *O'Connor* v. *Lee-Hy Paving Corp.*, we will state in text only the facts of *O'Connor* and will summarize the three other cases in the margin.[1]

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1 In *Schwartz* v. *Boston Hospital for Women*, Docket Nos. 78-7044, 7076 (decided Oct. 21, 1977), Gloria Schwartz and her husband brought suit in the District Court for the Southern District of New York against the Boston Hospital and Dr. Luke Gillespie for medical malpractice alleged to have occurred in Massachusetts when Mrs. Schwartz was at the hospital and under the care of Dr. Gillespie. The Boston Hospital is a Massachusetts corporation and Dr. Gillespie a Massachusetts resident. Jurisdiction over defendants was obtained by attaching the contractual obligations of St. Paul Fire & Marine Insurance Co. and Lumbermen's Mutual Casualty Co., both of which maintain offices in New York, to defend and indemnify the respective defendants under their insurance policies. Although defendants allege that their case is distinguishable from the others before us on the basis that the plaintiffs were not New York residents at the time of the alleged malpractice, Judge Lasker had earlier found that plaintiffs were New York domiciliaries at that time. *Schwartz* v. *Boston Hospital for Women*, 71 Civ. 1562 (September 29, 1975), at 2-3. We sustain that conclusion.

The plaintiff in *Kotsonis* v. *Superior Motor Express*, Docket No. 78-7058 (decided Dec. 6, 1977), sued in the District Court for the Eastern District of New York, individually and as administratrix of the estate of her husband, Pa[illegible]s Kotsonis, for damages resulting from an accident in Maryland in which the decedent's truck was struck by a

Mrs. Marguerite O'Connor, administratrix of the estate of her husband, Daniel J. O'Connor, sues for personal injuries to and the wrongful death of her husband which occurred in an industrial accident at the construction site of the Regency Square Shopping Center near Richmond, Virginia. Plaintiff alleges that her husband was struck and killed by a motor grader owned by defendant Lee-Hy Paving Corp. and negligently operated by defendant Davis E. Clem, an employee of Lee-Hy. O'Connor was a New York resident and was employed by L. Farber & Co., a New York proprietorship. His duties with Farber included supervising construction of the Regency Square Shopping Center, which took him to the construction site at least one day a week, and frequently three or four times a week.

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vehicle owned by Superior Motor Express, which was towing a trailer owned by Earnhardt Lumber Co. and was driven by Kenneth Bentley, an employee of Earnhardt. Kotsonis was a New York resident. All of the defendants are residents of North Carolina and do not transact business in New York. Plaintiff obtained an order of attachment of the contractual obligation of Kemper Insurance Co. to defend and indemnify the defendants. Kemper does business in the state of New York. Judge Nickerson denied the defendants' motions to vacate both the service of process and the order of attachment, or alternatively to dismiss or transfer the case on the ground of *forum non conveniens*. Only the former ruling is before us.

The plaintiff in *Ferruzzo* v. *Bright Trucking Inc.*, Docket No. 78-7047 (decided Dec. 22, 1977), sustained injuries in a collision in Indiana as a result of the allegedly negligent operation of a tractor-trailer owned by Landy of Wisconsin, Inc., a Wisconsin corporation, leased by Bright Trucking, Inc., a Minnesota corporation, and driven by Joseph Larson, an employee of Landy and a resident of Wisconsin. Plaintiff is a resident of New York and is employed by a New York firm for which he was transporting inventory at the time of the accident. He brought suit in the District Court for the Eastern District of New York and obtained jurisdiction over defendants Landy and Larson by attaching the obligation of Hartford Accident & Indemnity Co., which does business in New York, to defend and indemnify them pursuant to its insurance policy with Landy. Plaintiff moved to confirm the order and defendant cross-moved to vacate it or in the alternative to transfer venue to Indiana. Judge Sifton of the Eastern District granted the plaintiff's motion and denied the defendants'.

He was on an overnight visit when he was killed on September 25, 1975. Defendant Lee-Hy, is a Virginia corporation which transacts no business in New York. Defendant Clem is an employee of Lee-Hy and a resident of Virginia, who has no contacts with New York.

Plaintiff filed her complaint in the District Court for the Eastern District of New York on November 6, 1975 and thereafter moved for an order pursuant to New York Civil Practice Law and Rules § 6201 to attach the contractual obligations of Royal-Globe Insurance Co. and Continental Casualty Co. to defend and indemnify Lee-Hy under its insurance policies. Both insurance companies do business in New York and have offices in the state, but neither lists New York as its principal place of business.

The requested order was granted on December 9, 1975. On July 22, 1977, a month after the *Shaffer* decision, defendants made the motion here at issue, which Judge Dooling denied in a carefully considered opinion on September 27, 1977, 437 F.Supp. 994. On October 14, 1977, he certified interlocutory appeals from his decision and also from an earlier order concerning the choice of law issue indicated above. This court granted defendants' petition for leave to appeal both orders on January 23, 1978. This appeal followed.[2]

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2 There have been a number of decisions on the jurisdictional issue other than those before us. In *Emsheiner* v. *Callahan*, No. 76 C 325 (E.D. N.Y., Oct. 19, 1977), Judge Pratt raised the issue of the continued viability of *Seider* after *Shaffer*. Both counsel agreed that Judge Dooling's opinion in the *O'Connor* case had resolved the issue, and Judge Pratt entered an order accordingly.

One month later, in *Torres* v. *Towmotor Division of Caterpillar, Inc.*, Civ. No. 77 C 1810 (E.D.N.Y., Nov. 18, 1977), Judge Bramwell denied the plaintiffs' motion for an attachment order on the ground that *Seider* v. *Roth*, *supra*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, had been undermined by *Shaffer*. *Torres* was a products liability action by a New York resident against the manufacturer and distributor of a forklift which injured him in the course of his employment in New Jersey. The plaintiff sought to obtain jurisdiction in New York over the distributor, a

I.

Appellants' attack on the decisions below is simple and straightforward. In their view, *Shaffer* conditions the exercise of what has been called *quasi in rem* jurisdiction, more particularly the exercise of jurisdiction where the

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New Jersey corporation, by attaching its insurer's obligation to defend and indemnify the corporation. After reviewing the development of the *Seider* line of cases and our opinions upholding the constitutionality of *Seider*, Judge Bramwell ruled that the *Seider* procedure was not a direct action against the insurer and did not fulfill the minimum contacts requirement of *Shaffer* and concluded that *Harris* v. *Balk*, 198 U.S. 215 (1905),

> was the seed from which *Seider* evolved and it provided the roots through which *Seider* was nourished. Thus, since this seed has been pulled and its roots have been severed from the fertile field of legal precedent by *Shaffer*, *Seider*'s viability has likewise been quashed.

Torres, *supra* at 36. For reasons not known to us, this decision has not been appealed. Judge Sifton in *Ferruzzo* and Judge Nickerson in *Kotsonis* had both the *O'Connor* and the *Torres* opinions before them in rendering their decisions upholding the constitutionality of *Seider* in December, 1977.

A number of New York state courts have also considered the question. The Fourth Department of the Appellate Division upheld the constitutionality of *Seider* and its progeny in *Alford* v. *McGaw*, No. 48/1978 (March 1, 1978). There, New York plaintiffs who were injured in Ontario, Canada when their car was struck by the defendant's car brought an action for damages in New York. Plaintiffs obtained jurisdiction over the defendant, a resident of Ontario, by attaching the obligation of the Hartford Fire Insurance Co., which does business in the state of New York, to defend and indemnify him. The Appellate Division upheld the trial court's refusal to vacate the attachment because the relationship of the insurance company's debt to the cause of action and the company's central role in the litigation satisfied the minimum contacts test prescribed by *Shaffer*.

Lower courts in New York have come out on both sides of the question. Compare *Rodriquez* v. *Wolfe*, N.Y.L.J., 2/6/78, p. 15, col. 1; *Nelson* v. *Warner Bros. Jungle Habitat*, N.Y.L.J., 3/17/78, p. 7, col. 1; *Smith* v. *Kraftco Corp.*, N.Y.L.J., 3/24/78, p. 12, col. 3, upholding *Seider*; with *Kennedy* v. *Deroker*, 398 N.Y.S.2d 628 (1977); *Katz* v. *Umansky*, 399 N.Y.S.2d 412 (1977); *Wallace* v. *Target Store, Inc.*, 400 N.Y.S.2d 478 (1977); *Hutchinson* v. *Hayes Bros., Inc.*, N.Y.L.J., 3/17/78, p. 4, col. 2; *Schoen* v. *Berotti*, N.Y.L.J., 3/17/78, p. 7, col. 3, finding *Seider* attachment unconstitutional.

ownership of property within the state is used to subject the defendant to its courts,[3] on the existence of at least some other "contacts" between the defendant and the state. In these four cases there are admittedly no contacts between the named defendants and New York. Although appellants consider this argument alone to be dispositive, they add other makeweights. They contend that in sustaining the constitutionality of *Seider*, both the New York Court of Appeals in *Simpson* v. *Loehman*, 21 N.Y.2d 305, 310, 287 N.Y.S.2d 633, 636 (1967), *motion for reargument denied*, 21 N.Y.2d 990, 290 N.Y.S.2d 914 (1968), and this court in *Minichiello* v. *Rosenberg*, *supra*, 410 F.2d at 117-18, rested squarely on *Harris* v. *Balk*, *supra*, 198 U.S. 215. Since *Shaffer* clearly overruled *Harris* on its own facts, 433 U.S. at 208-09, *Seider*, they say, must fall with it. By way of minimizing the Court of Appeals' determination in *Simpson* that *Seider* comports with the *International Shoe* fairness standard, they point to Chief Judge Fuld's remark in that case inviting the New York Law Revision Commission and the Advisory Committee of the Judicial Conference "to conduct studies in depth and make recommendations with respect to the impact of *in rem* jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally." 21 N.Y.2d at 312, 287 N.Y.S.2d at 638. This task, they suggest, has now been performed by a still more august body, the Supreme Court of the United States.[4]

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3 The Restatement of Judgments 2d, § 11, calls this "attachment jurisdiction". (Tent. Draft No. 5, March 10, 1978). This description is useful since, unlike the more general term "quasi in rem jurisdiction," it differentiates the cases with which we are concerned from those where "claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant," *Shaffer*, *supra*, 433 U.S. at 207, and we shall use it.

4 It is difficult to fathom how a Supreme Court decision which mandates the very type of inquiry in which the Court of Appeals engaged

If the plaintiffs in these cases had "attached" the debt to defendants of a debtor only transitorily in New York, as in *Harris* v. *Balk*, or even bank accounts maintained by them in New York, we would readily agree that attachment jurisdiction could not be sustained when, as here, the defendants had no other "contacts" with New York. In such a case, *Shaffer* v. *Heitner* clearly forbids a state from depriving a defendant of his property in the debt that is owed him unless other contacts make it fair to do so. See *Intermeat, Inc.* v. *American Poultry Incorporated*, Docket Nos. 77-7481, 7495, decided April 14, 1978, slip opinions 2519. What sharply differentiates these cases from those just hypothesized is that a judgment for the plaintiff will not deprive a defendant of anything substantial that would have been otherwise useful to him. He could not recover, sell or hypothecate the covenant to indemnify; its utility is solely to protect him from liability

can fill the office that appellants ascribe to it. Quite clearly, what Judge Fuld sought was information concerning the practical consequences of the *Seider* attachment procedure information which significantly has not been forthcoming in these proceedings. See pp. 3139-40 *infra*.

Inherent in appellants' brief and argument is a contention that, as is claimed to be evidenced by Judge Breitel's concurrence for himself and Judge Bergan in *Simpson*, *supra*, 21 N.Y.2d at 314-16, 287 N.Y.S. 2d at 640-42, by *Newman* v. *Dreyfuss*, 39 N.Y.2d 999, 387 N.Y.S.2d 240 (1976), and by *Donawitz* v. *Danek*, 42 N.Y.2d 138, 141-42, 397 N.Y.S. 2d 592, 594-95 (1977), the New York Court of Appeals is disenchanted with *Seider*, clings to it only because of "considerations of institutional stability and the mandates of *stare decisis*," *Donawitz*, *supra*, 42 N.Y.2d at 142, 397 N.Y.S.2d at 595, and would welcome a decision that *Shaffer* has supplied the needed excuse for departing from precedent. Of course, the Court of Appeals is entirely free to reexamine *Seider* on its merits and conclude that, in light of the general illumination afforded by *Shaffer* or otherwise, its continued existence is undesirable as a matter of New York law. Our holding is simply that, on the basis of what is now before us, we do not find the *Seider* attachment procedure so offensive to "traditional notions of fair play and substantial justice," *Shaffer*, *supra*, 433 U.S. 203, 205, 206, 211, 212; *Kulko* v. *Superior Court of California*, 46 U.S.L.W. 4421 (May 15, 1978), as to violate the due process clause of the Fourteenth Amendment.

and in an appropriate case to allow the plaintiff to recover from the insurer under § 167(1)(b) of the New York Insurance Law.[5] What we said in *Minichiello, supra*, nine years ago *apropos* of *Harris* v. *Balk* remains just as true today:

> [A]ppellants' problem is significantly less serious than was Balk's in several respects. Balk had to decide whether to hire a Maryland lawyer to protect his interest in the $180 debt Harris owed him; the appellants are entitled to have lawyers in New York furnished by their insurers without expense. The Maryland judgment deprived Balk of money he could have used for whatever purpose he willed; *a Seider judgment would mean simply that liability policies on which appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured.*

410 F.2d at 118 (emphasis supplied). Moreover, since the insurance policy was purchased to protect against the type of liability which is the subject of the lawsuit and since the obligation to defend clearly encompasses the litigation, *Seider* does not sanction "the type of *quasi in*

5 It might be contended that a judgment up to the policy limits would exhaust the protection of the insurance policy and thereby expose the defendant to a subsequent suit for damages in excess of those limits in a forum where *in personam* jurisdiction over him could be acquired. However, the imposition on the defendant in this respect is not greater than that effected by a direct action against the insurer, which we found permissible in *Minichiello*, *supra*, 410 F.2d at 110. See note 7 *infra*.

If it be contended that the line of argument in text emphasizes the questionability of the *Seider* holding that the insurer's obligation of indemnification was a "debt" attachable under New York CPLR 5201 and 6202, the answer is that this is solely a question of New York law which the Court of Appeals has authoritatively decided. See *Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (Marshall, *C.J.*).

rem action typified by *Harris* v. *Balk* and the present case [sequestration of shares in a Delaware corporation]", where the property which "serves as the basis for . . . jurisdiction is *completely unrelated* to the plaintiff's cause of action," *Shaffer* v. *Heitner, supra*, 443 U.S. at 208-09 (emphasis supplied).[6] The fall of *Harris* v. *Balk* therefore does not necessarily topple *Seider*, and it is necessary to probe more deeply than appellants would have us do.[7]

---

6 Some of the appellants argue that the vacating and remanding of *Savchuk* v. *Rush*, 245 N.W.2d 624 (Minn. Sup. Ct. 1976), a case upholding a *Seider* attachment, for further consideration in light of *Shaffer*, see 433 U.S. 902 (1977), indicates that the Supreme Court believed that contacts other than those between the plaintiff and the insurer were necessary to sustain jurisdiction. This reads too much into the Court's action. At most, it was an affirmation of the Court's declared unwillingness to determine at that time the extent to which jurisdictional doctrines other than those before it in *Shaffer* were affected by the decision. See *Shaffer, supra*, 433 U.S. at 208 n.30, 212 n.39. In any event, *Rush* is not so strong a case for upholding jurisdiction as this one since the plaintiff there resided at the time of the accident in the state in which the accident occurred and only subsequently moved to Minnesota. The dissent in *Rush* argued that sustaining jurisdiction under these circumstances in effect allowed the plaintiff a choice of 50 jurisdictions in which to sue. See *Farrell* v. *Piedmont Aviation*, 411 F.2d 812 (2 Cir.), *cert. denied*, 396 U.S. 840 (1969); *Fish* v. *Bamby Bakers, Inc.*, 76 F.R.D. 511 (N.D.N.Y. 1977) (residence in New York at time of accident necessary to sustain *Seider* attachment).

7 This is recognized in the Restatement of Judgments 2d at 84-86 (Tent. Draft No. 5, March 10, 1978). Referring to the *Seider* problem this states that

> The jurisdictional question would seem to be the same for both "direct action" and attachment jurisdiction. If the circumstances that the plaintiff is a resident of State X and the insurance company is doing business there are sufficient to sustain *in personam* jurisdiction for a "direct action" against the insurer, they should *also* be sufficient to sustain attachment jurisdiction against the insurer, and vice versa.

(Emphasis supplied). As developed below, we held in *Minichiello* that these circumstances *were* sufficient to sustain *in personam* jurisdiction in a direct action against the insurer. 410 F.2d at 109-10, and nothing in *Shaffer* reflects adversely on that conclusion.

The overriding teaching of *Shaffer* is that courts must look at realities and not be led astray by fictions. Quoting the Restatement Second of Conflict of Laws § 56, introductory note, Mr. Justice Marshall explained that "[t]he phrase 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing" and held in consequence that "in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'" 433 U.S. at 207. This need for a realistic approach had been recognized by Chief Judge Fuld when he wrote in *Simpson, supra*, 21 N.Y.2d at 311, 287 N.Y.S.2d at 637:

> The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See *e.g., International Shoe Co.* v. *Washington*, 326 U.S. 310; *McGee* v. *International Life Ins. Co.*, 355 U.S. 220; *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke*, 15 N.Y.2d 443 [261 N.Y.S.2d 8, 209 N.E.2d 68].) Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation.[8]

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8 Judge Dooling put the point even more forcefully in the *O'Connor* case, *supra*, 437 F. Supp. at 1003:

> The emphasis in many of the cases on the supposedly contingent nature of the insurer's obligation appears to be misplaced. The occurrence of the accident, the plaintiff's injuries, and the insured's

Moreover, as we said in the passage from *Minichiello* quoted above, a plaintiff's judgment in a *Seider* type case does not deprive the defendant of money; the full force of the judgment rests on the insurer. As Judge Dooling stated below, 437 F.Supp. at 1002:

> *Seider* v. *Roth* and *Simpson* are *sui generis* in the field of jurisdiction. They cannot be pigeon-holed as *in rem* or *in personam*. They are in real terms *in personam* so far as the insurer is concerned. For the named defendant the suit is only an occasion of co-operation in the defense; his active role is that of witness. It is beside the point to test the constitutionality of the procedure in terms of the named defendant; his role as a party is hardly more real than that of the casual ejector Richard Roe in common law ejectment actions. What is at stake in the suit is the plaintiff's claim for the payment of his alleged damages by the insurer.

Thus, we must first determine whether forcing the insurer to defend in New York is so unfair as to violate due process. Nothing in *Shaffer* affects so much of our prior decision in *Minichiello* as holds that an insurer doing business in New York has no justifiable ground for complaint

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connection with the accident are determinative events. To be sure there may never be a suit, but the insured is under an immediate duty to give prompt notice of the accident to the insurer. Investigation usually commences at once, and the parties in interest, potential plaintiff, insurer and insured are identified. Control of investigation, defense and settlement are in the insured's hands. The prospective plaintiff's relationships are with the insurer, not with the insured. When an action is commenced the insurer controls the conduct of the defense, and, if the suit is in a federal court, plaintiff may obtain discovery of the existence and content of any relevant insurance agreement (Rule 26(b)(2)).

See also *Kirchen* v. *Orth*, 390 F. Supp. 313, 318-19 (E.D. Wis. 1975).

at New York's asserting a jurisdiction over the insured which, by virtue of § 167(1)(b) of the New York Insurance Law, may result in a judgment requiring the insurer to pay the plaintiff up to the policy limit. Doing business in the state continues to be a recognized basis for the existence of *in personam* jurisdiction over a corporation. See Restatement Second of Conflict of Laws, § 47, adopted in Restatement Second of Judgments, *supra*, § 8a (Tent. Draft No. 5); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 317-19 (1945).[9] There is no point in rehashing the arguments concerning the inconvenience to the insurer in being obliged to try the issue of liability in a state that may be far removed from the site of the accident. All these considerations were fully canvassed in *Minichiello, supra*, 410 F.2d at 110, where we pointed out, citing *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 181 (2 Cir. 1967), which quoted von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1128 (1966), that there has been "' a movement away from the bias favoring the defendant' in matters of personal jurisdiction 'toward permitting the plaintiff to insist that the defendant come to him' when there is a sufficient basis for

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9 Section 47 of the Restatement Second of Conflict of Laws states:

> (1) A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action arising from the business done in the state.
>
> (2) A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.

While there are no findings as to the substantiality or continuity of the insurers' business dealings in New York, appellants have not contested that this is "continuous and substantial." See *Beja* v. *Jahangiri*, 453 F.2d 959 (2 Cir. 1972), which discusses the standard for what constitutes "doing business" in New York in order to support a *Seider* attachment.

doing so." Here the sufficient basis is furnished by the insurer's maintaining an office and regularly transacting business in New York—not to speak of the convenience to the plaintiff in having a trial where witnesses on damages will be more readily available and the fact that in the large proportion of these actions that are settled the insurer usually has no particular interest in requiring the action to be brought at the site of the accident or the residence of the insured.[10] It is plain that, on this aspect of the problem, *Shaffer* has wrought no change in the law.

This, however, is not the end of the inquiry since, as recognized in *Minichiello, supra*, 410 F.2d at 110-13 (panel opinion), 117-19 (*en banc* opinion), we must also consider whether sustaining *Seider* jurisdiction would be unfair to the nominal defendant, the insured—even though, as Judge Dooling noted, 437 F.Supp. at 1003, it is somewhat ironical that "it is the insurer, the one who is responsible for the defense of the suit and for the payment of any judgment, and who is itself unable to deny that it is fully suable in the state, who puts forward the plea to jurisdiction in the name of the nominal defendant, who will not pay the judgment, nor manage the defense."

When the constitutionality of *Seider* was last before us, our chief concern in this regard was whether a *Seider* judgment, although limited in New York to the amount of the policy, might be given collateral estoppel effect in some other state, at least as to issues actually litigated, see 410 F.2d at 111-12. We concluded, *id.*, that:

10 If it be said that even in such cases the insurer may be prejudiced by fear of the supposedly greater liberality of New York juries, we fail to see why this interest is superior to that of a New York resident in having damages assessed by a jury of the state of his residence. Certainly any such interest of the insurer is not of constitutional magnitude.

> Whatever the right rule may be as to *quasi in rem* judgments generally, we think it clear that neither New York nor any other state could constitutionally give collateral estoppel effect to a *Seider* judgment when the whole theory behind this procedure is that it is in effect a direct action against the insurer and that the latter rather than the insured will conduct the defense.

This conclusion has been reinforced both by portions of the Restatement Second of Judgments making numerous exceptions to the rule of issue preclusion which would clearly include a *Seider* judgment, see § 68.1 (Tent. Draft No. 4, April 15, 1977), § 88 (Tent. Draft No. 3, April 15, 1976), § 75(c) (Tent. Draft No. 1, March 28, 1973); see also Reporters Note, *id.* at pp. 215-16 ('[i]n some contexts [involving attachment jurisdiction, issue] preclusion may be inconsistent with the requirements of due process . . . . But *absent any constitutional constraint*, it is believed that issue preclusion is appropriate." (emphasis supplied)), and by the emphasis on fair play in *Shaffer* itself. Our statement in *Minichiello*, "we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so", 410 F.2d at 112, has even greater force when, as we now see it, the "possibility" has declined to the vanishing point.

With respect to other alleged hardships on the insured we see no occasion to add to our discussion in *Minichiello* beyond saying two things: The first is that we find some significance in the fact that although *Seider* has been the law of New York since 1966, appellants, represented by highly capable counsel, have not brought to our attention a single instance where any of the anticipated "horribles" —inability or refusal of the insured to appear in New York for deposition or trial, see 410 F.2d at 112, 118, failure

to assert a counterclaim, see 410 F.2d at 112-13, and "multiple claims where the damages exceed the policy limits and the insured is without funds to pay the excess", see 410 F.2d at 119—has occurred. The second is that we deal only with the cases before us; in holding that application of *Seider* in these cases does not offend *Shaffer* we are not saying that a case where such application might violate due process could never arise.[11]

We therefore affirm the four orders declining to vacate the "attachments" of the liability policies and to dismiss the actions for want of jurisdiction.

II.

The other interlocutory appeal allowed in the *O'Connor* case raises a choice of law question. Some further statement of the facts is required.

On April 16, 1974, Regency Square, Inc., a Virginia corporation, Leonard L. Farber, and E. Carlton Wilton, a Virginia real estate developer, formed Quioccasin Associates as a limited partnership with Regency Square, Inc. as the general partner. The purpose of the partnership was "to develop and operate a regional shopping center known as Regency Square Shopping Center . . . ." On the same date, Quioccasin, Regency Square, Inc. (for itself and as general partner of Quioccasin), Leonard L. Farber of Florida, Inc., along with Wilton Leasing, Inc., and E. Carlton Wilton, Inc., both Virginia corporations, entered into an agreement providing in relevant part that Quioccasin would become lessee of the acreage on which the project was to be built, develop a regional shopping center to be called Regency Square Shopping Center, and engage "the services of Farber [of Flordia] as developer and advisor" for the Regency Square Shopping Center. Farber was to perform its services as an independent contractor until construction was complete and 95% of the leasable area had been rented or sold and was open for business.

11 Although the argument may not be articulated as such, appellants' attack seems to rest in some measure on a general view that since *Seider* was regarded in many quarters as an extreme application of attachment jurisdiction, it should be among the first victims of *Shaffer*. See also Leflar, American Conflicts Law § 25 (3d ed. 1977). This ignores the *sui generis* nature of *Seider* jurisdiction as outlined by Judge Dooling, 437 F. Supp. at 1002, and as analyzed above.

Lee-Hy contracted directly with Quioccasin, by the general partner, Regency Square, Inc., to engage in grading, paving and other specified work on the center. Lee-Hy was brought into the project by an employee of Farber of Florida, and its contract was negotiated by the decedent O'Connor. O'Connor was employed by Farber of New York, which was not a party to the Quioccasin agreement, but he performed services regularly for Farber of Florida in connection with construction of the shopping center and was doing this at the time of the accident that caused his death. He was covered under New York Workmen's Compensation Law by Farber of New York, and his widow has received death benefits under the New York compensation law.

After extensive discussion of Virginia's workmen's compensation statutes, 9A Virginia Code §§ 65.1-5, -29 -35, -40 -103, and decisions of state and federal courts construing them, the district judge found that Quioccasin, Farber, and Lee-Hy were in the "same employ" for purposes of the Virginia compensation statutes: *i.e.*, all were engaged in developing the Regency Square Shopping Center, and that under Virginia law Mrs. O'Connor's sole remedy would be the recovery of the benefits provided in the Virginia workmen's compensation statutes and no damage action would

lie against Lee-Hy or Clem. It is not disputed, under § 29(6) of the New York Workmen's Compensation Law, which provides that rights under the compensation law are exclusive "when such employee is injured or killed by the negligence . . . of another in the same employ," Mrs. O'Connor would not be barred from suing Lee-Hy and Clem for wrongful death occasioned by their negligence. The district judge held that New York would apply its law and consequently granted a motion by the plaintiff to strike an affirmative defense based on the Virginia workmen's compensation statutes and denied a motion by defendants for summary judgment on the same basis.

The question we must determine is what law a New York court seized of the *O'Connor* action would apply. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Appellants do not contend that New York is constitutionally required to apply Virginia law. *Carroll* v. Lanza, 349 U.S. 408 (1955), which dealt with the converse situation where the law of the state of employment barred third party suits but the law of the state of the accident, which was also the forum, did not, and Restatement Second of Conflict of Laws § 183, make it plain that New York is constitutionally free to apply its own law if it chooses.

Appellants mount a strong case that New York would—or in any event should—apply Virginia law. Recognizing that *Babcock* v. *Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963), represented a departure from the *lex loci delictus* rule, which would here dictate application of Virginia law, they assert that Virginia's "contacts" far outweigh New York's and that New York's interest in seeing that O'Connor's representatives receive adequate compensation for his death must be harmonized with the policy of limiting the costs imposed on employers by industrial accidents, which would dictate following Virginia law. They emphasize that

Lee-Hy planned its insurance program on the justifiable assumption that all work-related accidents on the job site would be governed by workmen's compensation and that allowing an action for damages would run counter to Lee-Hy's reasonable expectations.[12] Appellants rely also on §184 of the Restatement Second of the Conflict of Laws, which states:

> Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which
>
> (a) the plaintiff has obtained an award for the injury, or
>
> (b) the plaintiff could obtain an award for the injury, if this is the state (1) where the injury occurred, or (2) where employment is principally located, or (3) where the employer supervised the employee's activities from a place of business in the state, or (4) whose local law governs the contract of employment under the rules of §§ 187-188 and 196.[13]

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12 We do not find this argument particularly impressive since the record shows that Lee-Hy carried insurance for liabilities other than those covered by the workmen's compensation statutes to a policy limit of $2,000,000. Although the affidavit of Lee-Hy's president is ambiguous, we do not understand it to aver that Lee-Hy's policies do not cover the accident involving O'Connor. No such defense has been asserted.

13 Appellants cite a number of New York cases, decided before *Babcock* v. *Jackson*, *supra*, also cited in the Reporter's Note to Restatement § 184, which they argue apply the policies reflected in § 184. We do not find these relevant here. In *Barnhart* v. *American Concrete Steel Co.*, 227 N.Y. 531 (1920), participation in the New Jersey workmen's compensation program was optional, and plaintiff's decedent had elected

Finally appellants discern in *Neumeier* v. *Kuehner*, 31 N.Y. 2d 121, 128-29, 335 N.Y.S.2d 64, 70-71 (1972) and *Rogers* v. *U-Haul*, 41 A.D.2d 834, 342 N.Y.S.2d 158 (2d Dept. 1973), "a recent New York trend back to *lex loci*."

Mrs. O'Connor's arguments for the application of New York law are also powerful. She stresses that the decedent was a resident of New York, was employed in New York by a New York proprietorship, and worked in and out of his employer's office in New York. It would be unjust, plaintiff argues, if the rights of such a person should vary from day to day, depending on the state to which he happened to be dispatched to carry out his New York employer's business.[14] Plaintiff argues further that what appellants' per-

to be covered. The Court of Appeals held that as a matter of contract law the plaintiff was bound by the terms of the New Jersey scheme, which excluded any other remedies against the employer, and therefore could not bring a wrongful death action against the employer in New York. Daniel O'Connor made no analogous election to be covered by Virginia law. In *Yoshi Ogino* v. *Black*, 304 N.Y. 872 (1952), *aff'g*, 278 App. Div. 146, 104 N.Y.S.2d 82 (1st Dept. 1951), the appellate division reversed a decision striking a defense based on the exclusivity of North Carolina workmen's compensation remedies because it found that the North Carolina Workmen's Compensation Board would not necessarily be bound by a decision of the New York Board that plaintiff's injury had not occurred in the course of his employment. The appellate division concluded,

> Possibly, as alleged by defendant, the North Carolina Workmen's Compensation Law may provide plaintiff's exclusive remedy. The determination of this question must await an examination of North Carolina law at such time as the merits of this defense may be considered.

104 N.Y.S.2d at 86. The choice of law question was not considered, doubtless because New York law was still firmly ensconced in the *lex loci delictus* methodology and the accident had occurred in North Carolina. Indeed, the choice of law question was not even certified to the Court of Appeals. 304 N.Y. 872. *DeRosa v. Slattery Contracting Co.*, 14 A.D.2d 278, 220 N.Y.S.2d 871 (1st Dept. 1961), *aff'd*, 12 N.Y.2d 735, 234 N.Y.S.2d 217 (1962), was an even more straightforward application of the *lex loci* doctrine and hence is no longer a viable precedent.

14 This argument also is less impressive than might appear at first blush. O'Connor hardly engaged in estate planning on the basis that if he were killed in the course of employment, his estate would have a claim against any negligent third party.

ceive as a recent New York trend back to *lex loci* can be discerned only in cases in which the plaintiff was not a New York resident. She points instead to the one New York decision most nearly on point, *MacKendrick* v. *Newport New Shipbuilding & Dry Dock Co.*, 59 Misc.2d 994, 302 N.Y.S.2d 124 (Sup. Ct. N.Y. Co. 1969), where a respected New York judge denied, with a considerable show of rhetoric, a contention similar to that advanced by the defendants here.[15]

Our task, as noted, is to determine not what law we would choose to apply but what law the New York courts would apply. Although we do not pretend to full understanding

15 In *MacKendrick*, the plaintiff's decedent was employed by a New York firm under contract with Westinghouse to manufacture cooling systems for submarines. Westinghouse was employed by the Navy to install the cooling systems, and Newport News, to construct the submarines. MacKendrick was sent to the defendant's shipyards in Virginia to repair inadequacies in the cooling system, and he was killed there in an industrial accident. The court held first that MacKendrick's employer was not a subcontractor of any Newport News undertaking within the meaning of the Virginia Workmen's Compensation Law, and therefore he was neither entitled to that statute's remedies, nor, more importantly, subject to its provisions barring wrongful death actions. However, the court did reach the choice of law question in determining whether to apply Virginia's limitation of wrongful death recoveries to $30,000. After an extensive review of the New York choice of law decisions since *Babcock*, the court concluded:

> Clearly the public policy of our courts is to protect New York domiciliaries, wherever possible, from denial of a recovery in another jurisdiction . . . .
>
> Both logic and precedent mandate a construction consistent, whenever possible, with the State allowing a just recovery.

302 N.Y.S.2d at 140.

Although federal courts are no longer bound by the decisions of inferior state courts in the determination of state law, a decision by a lower court state judge in the mainstream of state decisions is entitled to respect. See Hart & Wechsler, The Federal Courts and the Federal System 708-10 (2d ed. 1973).

of *Babcock* v. *Jackson, supra,* and the many decisions of the Court of Appeals in its wake and might think that, in the light of fifteen years of experience under *Babcock,* the departure from the certainty of the *lex loci delictus* rule was not such a famous victory as it first appeared to be, see Ehrenzweig, Conflicts in a Nut Shell, 216-19 (3d ed. 1974), Cramton, Currie & Kay, Conflict of Laws 259-61 (2d ed. 1975), we see no indication that the highest court of New York has wavered in its determination to afford New York tort plaintiffs the benefit of New York law more favorable than the law of the *lex loci delictus* whenever there is a fair basis for doing so.

The line of such cases is impressive: *Kilberg* v. *Northeast Airlines,* 9 N.Y.2d 34, 211 N.Y.S.2d 133 (1961) (refusing to give effect to Massachusetts ceiling on recovery for wrongful death of New York resident in Massachusetts airplane crash);[16] *Babcock* v. *Jackson, supra,* 12 N.Y.2d 473, 240 N.Y.S.2d 743 (refusing to apply guest statute of Ontario, where accident occurred, to defeat claim of New York passenger); *Macey* v. *Rozbicki,* 18 N.Y.2d 289, 274 N.Y.S.2d 591 (1966) (refusing to apply Ontario guest statute against New York plaintiff even though she was staying at her relatives' home in Canada and trip began and was to end there); *Miller* v. *Miller,* 22 N.Y.2d 12, 290 N.Y.S.2d

16 We followed *Kilberg* in two other cases arising from the same Massachusetts airplane accident, *Pearson* v. *Northeast Airlines, Inc.*, 309 F.2d 553 (2 Cir. 1962) (*en banc*), *cert. denied,* 372 U.S. 912 (1963), where the facts were identical with those in *Kilberg,* and *Gore* v. *Northeast Airlines,* 373 F.2d 717 (2 Cir. 1967), where the plaintiff executrix and decedent's children had removed from New York to Maryland before suit was brought. More recently we followed *Kilberg* in *Rosenthal* v. *Warren,* 475 F.2d 438 (2 Cir.), *cert. denied,* 414 U.S. 856 (1973), refusing to apply Massachusetts' wrongful death limitations statute in a malpractice suit brought by the widow of a New York citizen against a Boston physician and hospital, and cited with approval the *MacKendrick* decision discussed above.

734 (1968) (refusing to apply Maine limitation on recovery in wrongful death action where a New York resident was killed while in a motor vehicle operated by his brother and owned by his sister-in-law who were Maine residents); *Tooker* v. *Lopez,* 24 N.Y.2d 569, 301 N.Y.S.2d 519 (1969) (refusing to apply Michigan guest statute to accident in Michigan involving New York passenger). In *Rosenthal* v. *Warren, supra,* 475 F.2d at 443, we reviewed these cases and found, as did the court in *MacKendrick,* see note 15 *supra,* that they left us with:

> the overwhelming conclusion that, except for a federal case which relied heavily on a discredited state case, the strong New York public policy against damage limitations has triumphed over the contrary policies of sister states in every case where a New York domiciliary has brought suit. This conclusion is particularly striking in wrongful death actions where the New York policy, embedded in a state constitutional prohibition against damage limitations, has without exception been applied in suits brought for New York decedents since *Kilberg.*

Here the basis for applying the more favorable New York law rather than the law of the *lex loci* to *O'Connor* is at least as great as in the cases cited. Appellants have failed to furnish us with persuasive reasons to believe that, if confronted with the problem here presented, the New York Court of Appeals would turn away from the path it has consistently followed since *Kilberg* and subject a New York resident, employed in New York by a New York employer and based in New York, to Virginia law which prevents him or his estate from suing for negligence a non-employer alleged to have negligently injured or killed him at the

worksite.[17] Accordingly we uphold the ruling of the district judge.[18]

All orders affirmed.

17 If it be said that the Virginia rule here at issue is less unreasonable than a limitation on recovery for wrongful death, which New York is prohibited from enacting by its Constitution, Art. I, § 16, or guest statutes, we find nothing to indicate either that this enters significantly into the choice of law determinations of the Court of Appeals or that it would not consider Virginia's restriction on the right to sue third parties for negligence at the worksite as being quite as unreasonable as a guest statute.

18 Appellants could argue that thus subjecting the insurer to New York's choice of law, which is more favorable to a plaintiff than Virginia's, demonstrates a hardship visited by *Seider* on the insurer and, because of an effect on future ratings, on the insured. However, exactly the same consequences would ensue if New York had authorized in terms a direct action on behalf of New York residents against insurers doing business in New York, and nothing in *Sheffer* affects our holding in *Minichiello, supra*, 410 F.2d at 110, that this would be constitutional.

Endorsement Order of Judge Morris E. Lasker dated October 21, 1977

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71 Civ. 1562

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,

Plaintiffs,

v.

BOSTON HOSPITAL FOR WOMEN,
a/k/a BOSTON LYING IN HOSPITAL, and
LUKE GILLESPIE,

Defendants.

LASKER, *D.J.*

These motions to vacate and set aside the order of attachment on which jurisdiction is predicated and to dismiss the complaint for lack of jurisdiction under Rule 56 of the Federal Rules of Civil Procedure, raise the same question decided by Judge Dooling in his thorough and thoughtful opinion in *O'Connor* v. *Lee-Hy Paving Corp.* and *Davis E. Clem*, 75 C. 1853 (E.D.N.Y. September 27, 1977).

For the reasons stated in Judge Dooling's opinion of September 27, 1977, the motions to dismiss are denied. However, for the reasons which Judge Dooling stated in his Memorandum and Certification of October 14, 1977, defendants' motions to certify the orders under 28 U.S.C. §1292(b) are granted because the dismissal of these cases involves a controlling question of law whether the United States Supreme Court's decision in *Shaffer* v. *Heitner*, 1977, 45 LW 4849, 97 S.Ct. 2569, invalidates the jurisdictional theory of *Seider* v. *Roth*, 17 N.Y.2d 111 (1966) and *Simp-*

Endorsement Order of Judge Morris E. Lasker dated October 21, 1977

son v. *Loehmann*, 21 N.Y.2d 305 (1967) and 21 N.Y.2d 990 (1968), and an immediate appeal from the order may materially advance the determination of the litigation.

It is so ordered.

/s/ Morris E. Lasker
Morris E. Lasker
U.S.D.J.

Dated: New York, New York
October 21, 1977.

Memorandum and Order of Judge Eugene H. Nickerson, dated December 6, 1977

UNITED STATES DISTRICT COURT

Eastern District of New York

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76 C 1916

Fontini Kotsonis, individually and as Administratrix of the Estate of Padias Kotsonis,

Plaintiff,

—against—

Superior Motor Express, Earnhardt Lumber Co. and the Estate of Kenneth Edward Bentley,

Defendants.

Appearances:

Decker & Long, Esq.
Attorneys for Plaintiff
1610 Richmond Road
Staten Island, New York 16304

Alexander, Ash, Schwartz & Cohen
Attorneys for Defendants
801 Second Avenue
New York, New York 10017

Nickerson, *District Judge:*

In this action the claim is for pain, suffering and wrongful death due to a collision between plaintiff's intestate's motor vehicle and a tractor-trailer in Maryland. Jurisdiction is invoked o nthe ground of diversity of citizenship.

Memorandum and Order of Judge Eugene H. Nickerson, dated December 6, 1977

Plaintiff, the widow of the deceased, is a resident of New York State. Joined as defendants are Superior Motor Express, a North Carolina Corporation and the owner of the tractor and Earnhardt Lumber Co., a North Carolina partnership, the owner of the trailer, neither of which maintains an office or does business in New York. Also joined as a defendant is the estate of the operator of the tractor-trailer.

An order of attachment was signed by Judge Costantino and served upon the Kemper Insurance Companies, the automobile public liability insurance carrier for the defendants. Defendants were also purportedly served personally in North Carolina.

Defendants have moved to vacate the order of attachment and to vacate the purported personal service. In the alternative defendants ask the court to dismiss the complaint on the ground of *forum non conveniens* or to transfer the action to the District Court in North Carolina or Maryland.

Both Judge Dooling in *O'Connor* v. *Lee-Hy Paving Corp.*, —— F. Supp. —— (E.D.N.Y. decided September 27, 1977), and Judge Bramwell in *Torres* v. *Townmotor Division of Caterpillar Inc.*, —— F. Supp. —— (E.D.N.Y. decided November 18, 1977), have written at length on the question of whether *Seider* v. *Roth*, 17 N.Y. 2d 111 (1966) survives *Shaffer* v. *Heitner*, —— U.S. ——, 97 S.Ct. 2569 (1977). They have reached inconsistent conclusions. I find the reasoning of Judge Dooling persuasive and therefore deny the motion to vacate the attachment. However, the purported personal service on the defendants should be set aside.

The motion to dismiss on the ground of *forum non conveniens* or to transfer is denied. Since I accept Judge

Memorandum and Order of Judge Eugene H. Nickerson, dated December 6, 1977

Dooling's reasoning and since the plaintiff, who will be a witness, is a resident of New York and the insurance company does business here, the action should remain in this district.

Under 28 U.S.C. §1292(b) Judge Dooling has certified the order in *O'Connor* v. *Lee-Hy Paving Corp.* determining the attachment valid. I do the same in this case. I am of the opinion that my order determining the attachment valid involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. So ordered.

Dated: Brooklyn, New York
December 6, 1977

/s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

Supreme Court, U. S.
FILED
SEP 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

78-268

LUKE GILLESPIE,

Petitioner,

-against-

GLORIA SCHWARTZ, WILLIAM SCHWARTZ, and BOSTON HOSPITAL FOR WOMEN,

Respondents.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO. and the Estate of KENNETH EDWARD BENTLEY,

Petitioners,

-against-

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,

Respondent.

RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

LUKE GILLESPIE,

Petitioner,

-against-

GLORIA SCHWARTZ, WILLIAM SCHWARTZ,
and BOSTON HOSPITAL FOR WOMEN,

Respondents,

SUPERIOR MOTOR EXPRESS, EARNHARDT
LUMBER CO. and the Estate of
KENNETH EDWARD BENTLEY,

Petitioners,

-against-

FONTINI KOTSONIS, individually and as
Administratrix of the Estate of PADIAS KOTSONIS,

Respondent.

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent, Fontini Kotsonis respectfully prays that a Writ of Certiorari not issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on June 12, 1978.

Pursuant to Rule 40(3) of the Rules of the U.S. Supreme Court, the respondent Kotsonis is satisfied with the requirements of Rule 40 (a-e) as set forth in appellant-petitioner's brief and respectfully refers this Court to appellants' brief therein.

REASONS FOR DENYING THE WRIT

I.

The decision of the Court of Appeals does not conflict with *Shaffer v. Heitner.*

A close analysis of *Shaffer v. Heitner,* 433 U.S. 186, and this case, clearly indicates that Kotsonis is distinguishable from the controlling decision of this Court.

The basis of the *Shaffer* decision is that in order for a Court to exercise quasi-in-rem jurisdiction, the property seized must have some reasonable relationship or contact with the underlying action. In *Shaffer*, the plaintiff was a *non-resident* (emphasis added) who owned one share of stock in the Delaware corporation, and who chose a state forum other than that of his residence. The attached property consisted of shares of stock belonging to certain respondent corporate directors. The property bore no relationship whatsoever to the underlying action, except as to form a possible basis of satisfying an eventual judgment.

The motor vehicle policy attached in this case, bears quite to the contrary.

In *Seider v. Roth,* 17 NY2d 111, 113, the Court stated:

> "Thus as soon as the accident occurred there was imposed on Hartford a contractual obligation which should be considered a "debt" within the meaning of CPLR 5201 and 6202."

Not only do all of the rights, duties and obligations of the insurer grow out of the attached policy, but if there is a recovery in the action, the payment of the judgment will emanate directly out of the terms of said policy, not some unrelated stock option. As pointed out by Judge Friendly in the opinion below, *O'Connor v. Lee-Hy Paving et ano,* Slip Opinion P. 3432; P. 7 of the opinion,

> "If the plaintiffs in these cases had "attached" the debt to defendants of a debtor only transitorily in New York, as in Harris v. Balk, or even bank accounts maintained in New York (See *Majique Fashions Ltd. v. Warwick & Co. Ltd.,* N.Y.L.J. 8-1-78, p. 5 Col. 3—Sup. Ct. N.Y. County—this author's cite), we would readily agree that attachment jurisdiction could not be sustained when, as here, the defendants had no other "contacts" with New York."

II.

It is not unfair to subject the Insurer, the real party in interest, to the quasi-in-rem jurisdiction enunciated in *Seider v. Roth.*

That the insurer is the real party in interest in these motor vehicle liability cases is without doubt. As soon as the accident occurs and the insurer receives notification, they are contractually obligated to defend that action wherever jurisdiction over the defendant driver is obtained (Seider, P. 114). They are in complete control of the in-

vestigation; full control of the litigation; select the defendants attorneys; decide when and if to settle; and make all procedural decisions in connection with the litigation (*Simpson v. Loehmann,* 21 NY2d 305, 311).

The petitioner contends that by the continuance of a *Seider* attachment, we are allowing a direct action against the insurer, in violation of Insurance Law 167 (1)(b) of New York State. In *Seider,* the Court held: (17 NY2d at P. 114)

> "It is said that by affirmance we would be setting up a "direct action" against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured."

It has been said that:

> "The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action (only) in order to protect the insurance company against overly sympathetic juries." (Concurring opinion of Judge Keating in *Simpson v. Loehmann* at page 314).

This has not been changed in the instant case. The named defendant is the insured and no prejudice can result to the insurer at trial. The prophetic words of Judge Fuld in *Simpson* (at P. 311), wherein he cites *International Shoe Co. v Washington,* 326 U.S. 310, have now come to fruition through *Shaffer.* The standard by which we shall judge "quasi-in-rem" or "attachment" jurisdiction is basic "fairness." Judging the instant case in terms of fairness, consider the following:

(1) The insurer has agreed, by contract, to defend the insured in any place where jurisdiction may be obtained. The insurer certainly cannot now claim surprise that it must defend in New York or anywhere else, especially in light of our mobile society.

(2) The amount of recovery is necessarily limited to the amount of the policy, so that the individual insured suffers nothing. Again payment for any judgment recovered would come directly out of the policy.

(3) The nominal defendant is still the insured. There is no possible prejudice to the insurer in defending in New York.

(4) The insurer, the real party in interest, is in full control of the litigation, whereas the insured has little or no voice in the handling of the action. Furthermore, the greatest percentage of cases are settled without trial, negating the requirement of the insured to travel from a foreign jurisdiction to the plaintiff's forum for trial. In weighing the equities, consider the burden on the plaintiff travelling to the foreign jurisdiction vs. the expense of travel for the defendant, which is underwritten by the insurer.

(5) New York State has a legitimate governmental interest in protecting the welfare of its citizens:

> "This Court has on a number of occasions given effect to the strong State interest in facilitating recovery of persons injured in automobile accidents. The fact that the injury occurs outside of this State does not of course, lessen that interest." (*Simpson v. Loehmann,* at P. 313)

In the instant case, the plaintiff was rendered a public charge of the State of New York as a result of the death of her husband.

(6) Convenience of witnesses. There are no "live" witnesses to testify in this action. The Maryland police report can be subpoenaed. However, it would be far simpler to obtain expert economic and accident experts in New York on the question of liability and damages. Also, the widow's testimony on damages would be essential. Consider the burden on her, on welfare assistance, of having to travel to Maryland or North Carolina to testify.

(7) Since *International Shoe v. Washington* is now the

standard for quasi-in-rem jurisdiction, let us consider the practical implication of that decision. The manufacturer therein, while deriving great revenues from the State of Washington, tried to avoid the payment of unemployment taxes. So too, Kemper Insurance Company maintains an office in the State of New York; does business regularly in the State of New York; gains considerable premiums from doing business in the State of New York; and surely looks to the Courts of the State of New York to protect its interests if need be. It enjoys all of the protection of the sovereignty by doing business in New York. It is not a *Harris v. Balk* (198 U.S. 215) casual debtor who just happened to be in New York State on occasion. It is not "unfair" to ask them to defend in New York against a claim by a New York resident.

(8) *Savchuk v. Rush* argument—The petitioner has put great emphasis on the fact that the U.S. Supreme Court remanded the case to the state court for reconsideration of the case in light of *Shaffer.* Without considering the obvious differences in fact patterns between *Savchuk* and the instant case, sufficeth to say, in my opinion, the Second Circuit has done what was asked in *Savchuk;* it has considered *Seider* attachment jurisdiction in light of *Shaffer* and has found it still to be viable.

I believe Judge Friendly sums it up best in the opinion below (*O'Connor v. Lee-Hy Paving et ano,* at Slip Opinion page 3439; p. 14 of the opinion):

> ". . . . . although Seider has been the law of New York since 1966, appellants, represented by highly capable counsel, have not brought to our attention a single instance where any of the anticipated 'horribles'—inability or refusal of the insured to appear in New York for deposition or trial, ... , failure to assert a counterclaim, ..., and 'multiple claims where the damages exceed the policy limits and the insured is without funds to pay the excess,' . . . . . has occurred."

CONCLUSION

The instant case meets the "fairness" test of *International Shoe v. Washington.* Wherefore, the Writ of Certiorari to review the order and opinion of the Court of Appeals, Second Circuit, should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-410

LEE-HY PAVING CORP. and DAVIS E. CLEM,
Petitioners,

against

MARGUERITE T. O'CONNOR, as Administratrix of the Goods, Chattels and Credits of DANIEL J. O'CONNOR, Deceased,
Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-361

BOSTON HOSPITAL FOR WOMEN,
Petitioner,

LUKE GILLESPIE,
Co-Defendant,

against

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,
Respondents.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-268

LUKE GILLESPIE,
Petitioner,

against

GLORIA SCHWARTZ, WILLIAM SCHWARTZ and BOSTON HOSPITAL FOR WOMEN,
Respondents.

Brief for Respondents in Opposition to the Petitions for Writs of Certiorari.

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IN THE

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against

GLORIA SCHWARTZ, WILLIAM SCHWARTZ and BOSTON HOSPITAL FOR WOMEN,

Respondents.

Brief for Respondents in Opposition to the Petitions for Writs of Certiorari.

The Sole Issue Presented.

From a Constitutional due process perspective, does the decisionally created procedure (*Seider v. Roth*, 17 N. Y. 2d 111) allowing a New York resident to obtain *in rem* jurisdiction in New York by attaching a nonresident defendant's liability insurance policy in New York comport with the traditional standards of fairness and substantial justice enunciated in *International Shoe v. Washington*, 326 U. S. 310 (1945), and iterated in *Shaffer v. Heitner*, 433 U. S. 186 (1977)?

Stated otherwise, are not the attached insurance policies so inextricably related to these resident plaintiffs' causes of action, and are not the insurance companies in

actuality the real parties in interest rather than the insureds, so as to constitute contacts with New York State sufficient to make it reasonable and just for New York State to exercise jurisdiction?

Respondent submits that those questions should be answered in the affirmative upon the *ratio decidendi* of the respective opinions of Judges Friendly, Dooling and Nickerson in the Courts below.

The salient facts in each of the cases have been fully set forth in the said opinions and in the petitions for the writs. Accordingly, in the interest of brevity, the facts will not be repeated herein.

ARGUMENT.

I.

The petitions should be denied for want of a substantive federal question. The *Shaffer* case did not promulgate any new principles requiring a rejection of the limited jurisdiction procured by the *Seider* attachments under the particular facts of the instant cases.

A. Prologue.

Petitioners' reliance on *Shaffer* as the springboard for their generic attack on all *Seider* attachments is misplaced because it directly conflicts with two kindred traditional principles: (1) the *Shaffer* opinion must be read "as the product of preoccupation with [its] special facts" (*Freeman v. Hewitt*, 329 U. S. 249, 252); (2) a person to whom a statute or decisional rule may constitutionally be applied will not be heard to challenge the statute or rule on the ground that it may conceivably be applied

unconstitutionally to others in other situations not before the Court (see *Broadrick v. Oklahoma*, 413 U. S. 601, 610).

When read in light of those caveats, the conclusion is ineluctable that *Shaffer* does not support petitioners' position. *Shaffer* was concerned with a totally dissimilar and unrelated factual situation and may be cited solely for the general proposition of law embraced in its opinion within the framework of the particular facts of that case.

Moreover, the *Seider* attachment procedure came into existence based upon an awareness of and compliance with the standard of fairness enunciated in *International Shoe*. Those standards have merely been iterated by *Shaffer*. The *Seider* attachment procedure under attack continues to meet those standards.

B. The *Shaffer* facts.

Plaintiff Heitner was a nonresident of Delaware, having no contacts, relationships or interests with that State; nor did the State of Delaware have any contacts, relationships or interests with him.

Heitner brought a stockholder's derivative suit in the Delaware Chancery Court charging twenty-eight individual defendants in their capacity as present or former corporate officers or directors of Greyhound Corp. with breach of fiduciary duty resulting in the corporation's liability. Greyhound Corp. is incorporated under the laws of Delaware with its principal place of business in Phoenix, Arizona.

None of those twenty-eight defendants were residents of Delaware. None of the activities which led to the lawsuit took place in Delaware.

In rem jurisdiction over twenty-one of the twenty-eight individual defendants was obtained on the basis of Delaware's sequestration statute (10 Del. Code 366) pursuant to which their shares of Greyhound stock and certain options were "seized" by placing "stop transfer" orders or their equivalents on the books of the Greyhound Corp.

Crucial is the fact that the stocks and options which were attached were owned by the individual defendants as stockholders only. *Their ownership had nothing whatsoever to do with their position as officers or directors of Greyhound by reason of which they were being sued by Heitner.* In fact, Heitner was unable to obtain *in rem* jurisdiction over seven of the individual officers or directors who apparently owned no stock in Greyhound.

This Court placed emphasis on its conclusion that "there is no necessary relationship between holding a position as a corporate fiduciary and owing stock or other interests in the corporation" (433 U. S. at p. 214) and that the property "is not the subject matter of this litigation nor is the underlying cause of action related to the property" (433 U. S. at p. 213).

Under Delaware law the defendants whose property had been attached were required to enter a general appearance, thus subjecting them to *in personam* liability, before they could defend on the merits. In finding that "express purpose of a Delaware sequestration procedure is to compel the defendants to enter a personal appearance" (433 U. S. at p. 209), this Court further found, with resultant criticism, that "the only role played by the property is to provide the basis for bringing the defendant into court" (433 U. S. at p. 209).

Greyhound Corp., which possessed the attached property of the individual defendants, had no interest in the

outcome of the litigation as it affected the property attached, nor any duty or obligation to the defendants in connection with the controversy. *Greyhound Corp. was purely and simply a stakeholder.* If the individual defendants defaulted, or instead decided to retain attorneys to defend, and thereafter lost on the merits, the ownership of the stock would change hands as ultimately determined by the judgment obtained without involvement and defense on the part of Greyhound.

C. The *Shaffer* decision.

In reversing jurisdiction predicated on the sequestration under the aforesaid facts, this Court held that "all assertations of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny" (433 U. S. at p. 212). Mr. Justice Marshall delineated those standards as follows (433 U. S. at p. 207):

> "The case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that '[t]he phrase "judicial jurisdiction over a thing, is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."' Restatement (Second) of Conflict of Laws §56, introductory note. This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*.

> "This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum state, the defendant, and the litigation."

Therefore, and of paramount importance, is the fact that this Court clearly recognized that in determining the minimum contacts required by *International Shoe*, the property attached could provide such contact with the forum state, the defendant and the litigation.

D. The *Seider* attachment procedure complies with the standard of fairness enunciated in *Shaffer*.

1. The property attached

In every case brought under *Seider*, including these instant lawsuits, the property attached in New York is the defendant's insurance company's obligation to defend and indemnify the defendant under a policy of insurance issued to the defendant by the insurance company for the purpose of satisfying any judgment that may be obtained by plaintiff.

The *Shaffer* decision requires that a determination be made as to whether the insurance policy provides a contact among the forum state, the defendant, and the litigation, its relation to plaintiff's cause of action or to the controversy, and its "role" other than providing the basis for bringing defendant into court.

It is therefore of significant importance that in each *Seider* attachment in the instant cases, the defendant's insurance policy clearly relates to rights and duties directly stemming from plaintiff's cause of action. Unlike the Delaware sequestration procedure in *Shaffer*, the attached

insurance policy is directly related to the controversy, viz, the policy provides the defense and source of recovery in the action.

Federal and state statutory and case law have always recognized the importance of the insurance policy and its relationship to such controversies. Both federal and state rules specifically mandate the disclosure of the extent and amount of applicable insurance coverage (Rule 26[b] [2] of the Federal Rules of Civil Procedure and Section 3101 [f] of the New York CPLR) as relevant and material to a controversy.

Section 167, subdivision 1 of the New York Insurance Law, as well as other similar state statutes (see, e.g., Section 38.1-380 of the Virginia Code) make the insurance carrier directly liable to a plaintiff not only if the judgment against the insured is not properly paid, but even if the insured becomes bankrupt.

The insurance policy, therefore, not only protects the insured but it directly obligates the insurance carrier to pay persons holding judgments against the insured for liability covered in the policy, thus making the plaintiff a third party beneficiary under the policy. If the insurance carrier refuses to defend, it may be brought in as a third party defendant under Rule 14 of the Federal Rules of Civil Procedure (*Colton v. Swain*, 527 F. 2d 296, 303 [7th Cir. 1975]).

The importance of the role of the insurance policy as the attached property was recognized in *Minichiello v. Rosenberg*, 410 F. 2d 106 (2nd Cir. 1968), cert. den. 393 U. S. 844, when the Second Circuit, in distinguishing a *Seider* attachment from the type of attachment in *Harris v. Balk*, 198 U. S. 215 (1905), wrote at page 118:

> "In contrast, appellants' problem is significantly less serious than was Balk's in several respects. Balk had to decide whether to hire a Maryland lawyer to protect his interest in the $180 debt Harris owed him; the appellants are entitled to have lawyers in New York furnished by their insurers without expense. The Maryland judgment deprived Balk of money he could have used for whatever purpose he willed; *a Seider judgment would mean simply that liability policies on which appellants could not have relied for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured.* Whatever Balk's situation may have been, appellants are assured that they may defend the New York actions without exposing themselves to personal liability and that any recovery by the plaintiffs 'is necessarily limited to the value of the asset attached, that is, the liability insurance policy.' *Simpson v. Loehmann*" (emphasis supplied).

2. The defendants and the litigation; a recognition of realities rather than fiction.

Any determination as to whether "minimum contacts" exist so as to satisfy the concepts of "fair play and substantial justice" as required by *International Shoe* and *Shaffer,* must be based on a recognition of realities rather than fiction. Such practical appraisal cannot ignore the compelling fact that in every *Seider* attachment case the real party in interest, and the *de facto* defendant, is the insurance carrier regulated by and located in the State of New York.

The importance of this reality was made clear by the New York Court of Appeals in *Simpson v. Loehmann,* 21 N. Y. 2d 305, 311:

> "Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it

> selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation. (Citation omitted) Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large."

The concurring opinion of Judge Keating in *Simpson* additionally stated (21 N. Y. 2d at p. 313):

> "Likewise, we have on a number of occasions recognized that the real party in interest is the insurer and we have again given effect to the fiction sought to be perpetuated here only where the insurer would be prejudiced thereby.
>
> ". . . The decision in *Seider v. Roth* and the cases we decide today represent a recognition of realities and not fictions."

To the same effect, see also: *Watson v. Employers Liab. Assur. Corp.*, 348 U. S. 66, 74; *Dobkin v. Chapman*, 21 N. Y. 2d 490, 502, 504; *Oltarsh v. Aetna Ins. Co.*, 15 N. Y. 2d 111, 118; *Thrasher v. U. S. Liab. Ins. Co.*, 19 N. Y. 2d 159, 167; *Barrios v. Dade County of Florida*, 310 F. Supp. 744.

3. The interests of the State of New York: a rationale of reasonableness.

The basic premise of this Court's decision in *Shaffer* requires courts to eschew all labels pertaining to *in rem* jurisdiction and to look instead at the true relative interests of the real parties and the state in terms of fairness.

Accordingly, a summary of the relevant facts in all *Seider* attachments are deemed of prime importance. Thus, in the instant case:

1. Plaintiffs are residents of the State of New York who had chosen as the forum their home state which has an independent and significant interest in their protection and welfare, which regulates the defendants' insurance companies, and thus "has a substantial and continuing relation with the controversy" (see *Simpson*, 21 N. Y. 2d at p. 311).

2. The property attached in New York, i. e., defendants' insurance policies, is clearly related to the controversy and plays the most significant role in the litigation.

3. The real parties in interest are defendants' insurance carriers which are regulated by and permanently established in the State of New York and who are in full control of the litigation.

4. The *Seider* attachment procedure limits liability to the policies' coverage with no personal exposure to the insured defendants; thus the policies are applied "to the very object for which they were procured" (*Minichiello*, 410 F. 2d at p. 118).

CONCLUSION.

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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